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# Wildlife Damage to Agriculture

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## Joint Interim Subcommittee on Agricultural Problems

December 1986

Montana Legislative Council

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# WILDLIFE DAMAGE TO AGRICULTURE

A REPORT TO THE 50TH LEGISLATURE

JOINT INTERIM SUBCOMMITTEE ON AGRICULTURAL PROBLEMS

December 1986

Published by

MONTANA LEGISLATIVE COUNCIL

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# HOUSE JOINT RESOLUTION NO. 36

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF WAYS OF ALLEVIATING DAMAGE CAUSED BY WILD ANIMALS TO AGRICULTURAL CROPS, LAND, AND FIXTURES THEREON.

WHEREAS, the wild animals of the state are a public resource, held in trust by the state for the benefit and enjoyment of all its citizens; and

WHEREAS, good game management policy requires protecting the wildlife resource as well as mitigating damage caused by wildlife through appropriate and expeditious action of the Department of Fish, Wildlife, and Parks; and

WHEREAS, landowners possess their land with the recognition that wildlife may use the land and that they must tolerate a certain level of use by wildlife; and

WHEREAS, a combination of current game management techniques and policy and several recent mild winters has resulted in an overpopulation of big game animals in many parts of the state, with a consequent increase in damage to agricultural crops and land; and

WHEREAS, several surrounding states and Canadian provinces have instituted programs to compensate landowners for damage caused by wild animals; and

WHEREAS, the wildlife resource provides a valuable source of revenue for both the State of Montana and local businesses through license sales and increased sales of goods and services to sportsmen; and

WHEREAS, the practice of certain landowners of closing their land to hunting directly affects the occurrence of game damage on adjoining lands.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That an appropriate interim committee be assigned to study and determine:

(1) the types of damage caused by wildlife to agricultural crops, land, and fixtures thereon;

(2) desirable population levels of wild animals to adequately preserve the wildlife resource while at the same time minimizing damage to private property;

(3) needed changes in the wildlife management policies of the state that would alleviate damage to private property caused by overpopulation of wild animals;

(4) whether current game management techniques and capabilities of the Department of Fish, Wildlife, and Parks are adequate to properly assess game populations and habitat in determining hunting quotas and seasons;

(5) methods available to the Department for preventing and mitigating damage, including but not limited to:

(a) methods of dealing with landowners who do not permit hunting and whose neighbors suffer damage resulting from the concentrations of wild animals on such land;

(b) cooperative agreements with neighboring states concerning joint damage control measures;

(c) development of quick-response types of action by the Department to individual complaints;

(d) preventive measures currently available or which could be made available, such as new kinds of fencing or repellants, herding, special hunting seasons, use of blood meal, night hunting or herding, scare techniques, and others;

(6) methods available to landowners of preventing and mitigating damage to their land and information and assistance that may be provided in implementing such methods;

(7) the extent of damage that a landowner should be reasonably required to bear, realizing that excessive and unusual damage will be impossible to prevent in certain individual circumstances;

(8) the feasibility of providing direct compensation to landowners and circumstances when such compensation may be payable;

(9) other, possibly alternative, compensation programs, such as purchase of conservation or habitat easements from landowners or providing tax or other incentives for maintaining wildlife habitat on private land; and

(10) the costs involved in any coordinated damage control program and how such costs should be allocated between landowners, sportsmen, and the general public.

BE IT FURTHER RESOLVED, that the committee report the findings of the study to the 50th Legislature and, if necessary, draft legislation to implement its recommendations.

Approved April 1, 1985.

## SUMMARY OF RECOMMENDATIONS

The Joint Interim Subcommittee on Agricultural Problems recommends that the 50th Legislature:

1. Recognize the considerable contributions of landowners to wildlife habitats and recreational opportunities in Montana and give serious consideration to legislation or policies that encourage agricultural landowners to expand the economic possibilities for their land, such as "ranching for wildlife" programs, or a wildlife habitat incentive program which would fund the lease, purchase, or conservation easement of big game and game bird habitat on private land;

2. Encourage the Department of Fish, Wildlife, and Parks to expand efforts to involve landowners in wildlife management policies and practices that affect the use and overuse of that private property by wildlife populations; and

3. Enact legislation that would encourage hunting access by limiting a landowner's liability exposure for injury to person or property regardless of the status of the person entering the property (permittee, invitee, or trespasser) and regardless of whether a fee is charged;

4. Continue, and expand if possible, the funding levels that have been granted to the Department of Fish, Wildlife, and Parks for wildlife damage

prevention and control and consider a program to grant low interest loans to landowners who sustain habitual wildlife damage and wish to install prevention devices;

5. Encourage the Department to expand and refine the "block management" program in which the Department assists groups of landowners to provide hunting opportunities.

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## INTRODUCTION TO THE STUDY RESOLUTION ISSUES

House Joint Resolution 36 directed a study of ways of alleviating damage caused by wild animals to agricultural crops, land, and fixtures. The resolution resulted from legislative consideration of several unsuccessful bills on wildlife damage compensation and from concern over an apparent increase in wildlife damage in the face of other agricultural problems in Montana.

The resolution recognizes certain public policy assumptions regarding wildlife damage:

-- that the wild animals of the state are a public resource, held in trust by the state for the benefit and enjoyment of all citizens;

-- that sound wildlife management policies require protecting the wildlife resource as well as mitigating damage caused by the animals through appropriate and expeditious actions by the Department of Fish, Wildlife, and Parks;

-- that landowners possess their land with the recognition that wildlife may use the land and that they must tolerate a certain level of use by wildlife; and

-- that Montana's wildlife resources provide a valuable source of revenue for both the state and the private business sector through license sales and sales of goods and services to sportsmen.

Although the study resolution assigned a detailed list of questions to be explored concerning alleviation of wildlife damage, it did not specifically request an investigation of the aforementioned policy assumptions or of additional public policy questions that should be addressed at the outset of the study. The following issues were set forth to help the study committee formulate public policy recommendations that could lead to appropriate solutions to the problem of wildlife damage in Montana. Some of the issues meshed with concerns expressed in the study of general agricultural problems in HJR 57, the other study conducted by the Subcommittee.

A. Does clear public policy exist regarding ownership and responsibility for the wildlife resources of the state and for any damage by such wildlife?

   1. What legal protections are afforded the wildlife resources of the state?

   2. What legal protections are afforded landowners regarding trespass or damage by wildlife?

B. What types of wildlife damage occur to agricultural crops, land, and fixtures, and what is the extent of such damage?

C. How have landowners and agricultural interest groups responded to wildlife damage?

D. Do state (Department of Fish, Wildlife, and Parks and Fish and Game Commission) wildlife management policies and techniques adequately protect

Montana's wildlife resources and at the same time protect landowners from significant wildlife damage to agricultural crops, land, and fixtures?

E. How have other states approached the problem of wildlife damage?

F. What methods are available to the Department for preventing and mitigating wildlife damage?

G. What is the feasibility of providing direct or other compensation to landowners for wildlife damage?

1. What should the circumstances be for providing such compensation?

2. What alternatives are there to direct compensation (i.e., purchase of conservation or habitat easements, providing tax or other incentives for maintaining wildlife habitat on private land, cooperative agreements with landowners regarding sportmen's privileges)?

3. What role could cooperative agreements between the Department and landowners regarding sportmen's privileges in an area play in alleviating game damage or in promoting a degree of landowner satisfaction for their contribution to wildlife habitat?

# WILDLIFE DAMAGE IN MONTANA

This report section is a summary of background information prepared in order to address the wildlife damage issues in the adopted study plan and the study resolution.

## I. LEGAL ASPECTS OF WILDLIFE DAMAGE

The following summarizes the scope of protection offered to both landowners and wildlife in Montana in instances of wildlife damage to agricultural crops, real property, and fixtures.[1]

Under Montana common law, one who acquires property does so with notice and knowledge of the presence of wildlife on the land. Thus, a landowner must accept and assume the cost of a certain level of wildlife-caused damage. However, the actual extent of damage a landowner must bear is a question that must be determined on an individual case basis. Clearly this determination may lead to disagreement.

Under Montana statutory law, the Department of Fish, Wildlife, and Parks (Department) has authority to establish a game damage program. Also under statute, a landowner may file with the Department a complaint of excessive wildlife damage. The Department is then required to study the situation to determine the need for appropriate remedial action. The determination of the necessity for and the extent of any departmental remedial action is another area in which affected persons may not agree.

## Legislative History of Wildlife Damage Laws

Montana's first wildlife damage legislation, enacted in 1933, related only to elk damage throughout the state and to antelope damage in Chouteau County specifically.[2] The statutes allowed the Fish and Game Commission "to take, kill, remove or dispose of" such animals if the following conditions prevailed: their numbers needed to be decreased; special or private property was being damaged; and a written complaint of such damage was filed by the owners with the Commission. The Commission also could permit other persons to take, kill, remove, or dispose of such animals under any rules it might prescribe.

In 1943, language was added to allow the Commission to alleviate antelope damage throughout the state by opening the season and issuing special licenses.[3] Similar provisions for special hunts to decrease elk and moose populations were enacted in 1945.[4] In 1947, a statute was created that allowed the Commission to dispose of or to open the season on deer that were causing property damage.[5] All such statutes were combined in 1953 and expanded to cover all "game animals".[6]

The present statute, 87-1-225, MCA, was substituted in 1957.[7] The new language required the Department to "investigate and study" any complaint by a landowner that "wild animals" were doing damage to property or crops (See Appendix A). The Department has the choice to:

-- open a special season;

-- destroy the animals; or

-- authorize the landowner to kill or destroy a specified number of animals doing the damage.

Wild ferocious animals causing damage or endangering life are exempt from this procedure, presumably to allow the landowner an immediate response to that kind of danger.

Another provision, 87-1-226, MCA, in effect since 1957, requires that all meat of animals killed under the damage statute must be donated to state institutions, school lunch programs, or the Department of Social and Rehabilitation Services. The language in 87-1-304, MCA, on special seasons for game damage was first included in that statute in 1955. (See Appendix A.)

## Case Law on Wildlife Damage

Two Montana Supreme Court cases have analyzed the extent of a landowner's right to protect property from damage by wildlife.

In State v. Rathbone, 110 M. 225, 100 P.2d 86, (1940), the Supreme Court ruled that in certain instances a property owner is entitled to resort to force in protecting his property from wildlife damage. This is seen as inherent in an individual's right to acquire and hold property. The court found that, just as individual property rights may validly be limited by laws enacted for the protection of the state's wildlife, the Constitution places limits on the permissible scope of wildlife management regulations and the state incurs some responsibility to assist a landowner in protecting his property from extensive damage.

> The people of the state may protect their public property in the manner best suited to accomplish the purposes for which the law was enacted but in doing so they may not disregard the natural and inalienable rights of individuals. State v. Rathbone, 110 M. at 239.

Within Rathbone is the basis of the recognition that landowners must tolerate a certain level of use by wildlife. The court also stated that the following are prerequisites of the use of force by a landowner:

> (1) he must have exhausted all other remedies provided by law; (2) the use of such force must be reasonably necessary and suitable to protect his property; and (3) he must use only such force and means as a reasonably prudent man would use under like circumstances.

In State ex rel. Sackman v. St. Fish and Game Commission, 151 M. 45, 438 P.2d 663 (1968), the Supreme Court examined the scope of the Department's authority under the forerunner of the current wildlife damage law to determine the state's response to a landowner's complaint of wildlife damage. (The statutes are identical in all parts relevant to this discussion.) The court found that the statute requires only that the Department investigate all complaints of wildlife damage. Beyond that, the statute neither requires the Department to respond to complaints with any particular action nor requires the Department to take any remedial action at all. Further, the court stressed that "injury to property by wild animals must be of considerable extent to warrant killing out of season or contrary to law."

## II. WILDLIFE DAMAGE ACTIVITIES IN MONTANA

### Recent Legislative Efforts

The record of the 1982 Joint Subcommittee on Fish and Game, an interim study committee, indicates that the Eastern Slope Landowner's Association approached the Subcommittee with proposals for compensating landowners for the pasturing of big game. The group suggested that compensation might be linked to a reduction in property or income taxes. The Subcommittee agree that game damage was a significant problem but made no further recommendations.[8]

During the 1985 session, three pieces of legislation were introduced to address the problem of game damage:

-- House Bill 314 (Cobb) would have provided the Department with the option of herding damage-causing animals off the property involved, with the permission of adjacent landowners. The bill was killed in the House on an adverse committee report.

-- House Bill 388 (Cobb) would have made it a definite responsibility of the Department to mitigate substantial damage by wildlife. The bill died in committee.

-- House Bill 191 (Asay) would have required reimbursement to a landowner who experienced wildlife damage if the Department failed to respond in some manner to a damage complaint within 48 hours of notice. The legislation provided for a damage claim appraisal process and a method for appealing

a reimbursement decision. The bill died in committee.

During the hearings on the above legislation, a number of landowners from around the state, including many legislators, expressed their frustrations with the various types of wildlife damage that can occur. The Department explained their difficulties with the proposed legislation and urged support for increased appropriations to the game damage program already in place.[9] The dialogue led to the successful passage of HJR 36 to study ways of alleviating wildlife damage and the feasibility of a damage compensation program.

## Department Responses to Wildlife Damage

According to 87-1-225, MCA, and the Sackman case previously noted in this report, the Department must "investigate and study" every complaint that is made by a landowner concerning wildlife damage. For each complaint, an investigator in the administrative region completes a "game depredation report" that documents the nature and history of the damage, an appraisal of the damage, and a record of action taken by the Department.

This longstanding procedure for handling complaints was formally approved as a Department guideline on September 30, 1985, and is included in Appendix B. Note that in item 5, the Department may discontinue assistance

> ... to a landowner who continues to aggravate game damage problems by closing or leasing

his property to hunting in succeeding years or when reasonable suggestions, actions, or remedies offered by the Department are refused. The decision to terminate assistance will be made by the director's office after reviewing the circumstances.

The Department has received the following number of game damage complaints over the last five years:

| FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|---|---|---|---|---|
| 153 | 142 | 82 | 529 | 309 |

In recent testimony, the Department has offered the following comments on its wildlife damage activities:[10]

-- Prevention is the most effective and efficient way to deal with game damage, and annual game harvests (hunting) are the foundation of any prevention program.

-- For the last three hunting seasons, quotas and bag limits were substantially liberalized in an attempt to contain expanding big game populations and keep them in balance with their habitat and the tolerance level of private landowners. In 1984, a hunter could take up to six deer in many areas, and more than 103,000 additional deer tags were issued; that is five times the 1982 amount. The number of antelope and deer permits issued in 1985 did decline, but the total is still more than the number issued in 1983.

-- Another effective and frequently used prevention technique is the special "early and late" hunting season. During the past two years, approximately

100 special hunts have been authorized. One result is that deer populations in eastern Montana are on a definite downward trend.

-- As a last resort to preventing continued damage by specific animals, kill permits may be issued to landowners. In FY 1984 and 1985, 198 deer kill permits were issued, authorizing the taking of 2,394 deer. The Department also authorized 112 elk kill permits and 184 antelope kill permits.

The Department's itemized expenditures for damage prevention in the last two fiscal years are listed below:

| | FY 84 | FY 85 |
|---|---|---|
| Herding & Other Contracted Services | $ 7,705 | $ 13,209 |
| Bloodmeal & Other Repellents | 8,013 | 16,244 |
| Ammunition | 1,834 | 2,036 |
| Fencing Materials; Elk Panels | 40,769 | 99,145 |
| Employee Expenses | 46,692 | 61,138 |
| Aircraft & Other Equipment Rental | 4,552 | 14,487 |
| Equipment | 1,722 | 5,910 |
| Other | 9,081 | 17,411 |
| TOTAL | $121,785 | $229,580 |

The amount spent on game damage activities in FY 82 was $65,374, and in FY 83, $59,045.

In the 1985 session, the Department was given an additional $75,000 and an FTE for game damage activities in the next biennium. The 1985 Legislature also authorized $200,000 to monitor the state's game populations by aircraft.

The Department's stated goals for the game damage program include:

-- improved response time;

-- adequate stockpiles of necessary materials; and

-- greater statewide consistency in handling damage complaints

The Department has initiated studies of new prevention techniques, such as: minimizing deer damage to tree farms; the effectiveness of electric fencing; a rotten egg treatment; and nylon netting to protect young trees.

During 1983 and 1984, the Department worked with an ad hoc committee of landowners and sportsmen and the Montana Fish and Game Commission to develop a cooperative landowner/sportsmen program. The main goal of this program is

> to maintain the productive capability of private land to provide food, water, cover and space for wildlife and encourage landowners to continue to provide the associated recreational opportunities to the public.[11]

The cooperative program has the following specific goals:

-- landowner insurance for accidentally killed livestock;

-- to increase public awareness of landowners' and land users' rights and liabilities;

-- to publicize trespass laws and expand the Department's authority for helping prevent trespass on private property;

-- a block management program to relieve the private landowner of the burden of administering the hunting season, thereby offering an incentive to keep some private lands open to hunting which would otherwise be closed;

-- to increase the Department's capability to respond to game damage problems;

-- to properly recognize the importance of private land and landowners in the production and utilization of Montana's wildlife resources; and

-- to pursue financial incentives for wildlife habitat preservation and/or enhancement.

The November/December 1985 issue of Montana Outdoors presented an indepth discussion of the biological aspects of game damage, the Department's game management policies, and the various damage prevention measures that have been explored.[12]

## 1982 Agriculture Department Study of Wildlife on Private Agricultural Lands

In 1982, the Department of Agriculture surveyed 676 operators of farms and ranches on which species of wildlife were causing damage to agricultural crops and property, what types of damage occurred, and what the producers' attitudes were toward damage.[13] Of those responding, 79% reported mule deer damage, 77% reported whitetail deer damage, and 60% reported antelope damage. Forty-nine percent said they had experienced "significant" damage, mostly by deer. Forty-six

percent of the respondents gave specific dollar amounts on the damage, ranging from $17 to $32,000. Eighty-nine percent of the respondents had no objection to supporting game, fish, or birds on the land. Fourteen percent reported specific management practices that were intended to improve certain wildlife habitats. Overall, the survey showed a positive attitude toward wildlife but did indicate an awareness of the damage potential.

## III. WILDLIFE DAMAGE LAWS AND POLICIES OF WESTERN STATES AND CANADIAN PROVINCES

This portion of the report surveys the public policy on wildlife damage in twelve Western states and two Canadian provinces that border Montana.[14] This overview contains brief descriptions of the following:

-- applicable statutes on wildlife damage;

-- administrative rules implementing wildlife damage policy;

-- fish and wildlife agency (Fish and Game Commission or Department) policy statements; and

-- recent costs of any damage program

### ALASKA

-- No statutory reference to game damage.

-- State attorney general has ruled that the state has no liability for wildlife damage and that the landowner is responsible for avoiding damage.

-- A regulation exists that allows a person to take any game in defense of life and property, but the same regulation requires exhaustion of other reasonable actions.

-- State does help landowners with hazing animals from agricultural property.

-- No specific costs.

ALBERTA

-- The government's prime duty with respect to wildlife is to ensure viable wildlife populations. The responsibility for wildlife damage is shared by the government and the public in that landowners are expected to protect themselves within reason.

-- A Wildlife Damage Fund has been created from a surcharge on licenses and permits (wildlife certificates). The Fund pays claims and supports the control program. Regulations define what types of damage are eligible for compensation and set the maximum claim amount. The Fund also covers livestock shot during hunting seasons.

-- Ungulate crop damage complaints in 1978-1983 ranged from 411 to 611, and $290,000 was spent in response to complaints.

ARIZONA

-- A statute allows a person suffering from game damage to take any measure except killing of animals; if such efforts fail, the person may file a complaint with the director of the Department.

-- If removal of damaging animals is necessary, the Commission may: establish special seasons and bag limits with reduction or waiver of fees; remove animals; or issue kill permits. The meat of any animal taken must be given to a public or

charitable institution. The landowner has the right to appeal any Commission decision.

-- Another statute provides that a person can take any bear or lion that has killed livestock.

-- Department policy is to have little direct interaction with damage problems and to encourage landowners to alleviate their own problems.

-- No funding specifically provided.

## BRITISH COLUMBIA

-- Wildlife damage law specifically states that no right to compensation for wildlife damage exists.

-- Ministry policy states that wildlife will not be controlled before sound agricultural practices are instituted to prevent problems.

-- Ministry has detailed policies on problem wildlife management, such as handling of complaints and investigations into agricultural practices.

## CALIFORNIA

-- Statute requires the Department to issue a "depredation" permit upon evidence of damage by elk, beaver, wild pigs, deer, or mountain lions; a fur-bearing mammal that injures property may be taken any time and in any way except steel traps.

-- Special hunts, trapping, and hazing are used most by the Department.

-- No special costs or funding.

COLORADO

-- The state has assumed statutory liability for big game damage since 1931. The program includes damage by big game to nurseries, orchards, crops under cultivation, harvested crops, fences, significant damage to livestock forage in excess of historical levels, and damage incurred in the use of damage prevention techniques, such as movement of wildlife by the Fish and Game Division.

-- The state is not liable for damage if a person fails to use or to accept prevention material, refuses to allow hunting or access, or charges a fee for hunting that exceeds $25 per person.

-- Costs averaged $30,510 for 1968-1978. Costs rose to over $1,000,000 in 1978-1980 due to a severe winter and legislation increasing types of damage covered and prevention provided.

IDAHO

-- A statute requires the Department to investigate all damage complaints. The Department may control or trap wildlife, allow landowner to do so, or may issue a kill permit.

-- The cost of handling 976 complaints in 1983 was $121,146; responses to the 918 complaints in the first six months of 1984 cost $137,234.

## NEBRASKA

-- Wildlife damage claims are processed through the State Claim Board and, if approved, are passed on to the legislature.

-- If a special season is established to prevent damage, the $20 license fee is divided between the Commission and any landowner who can prove that a designated game animal was shot on the landowner's property.

## NEVADA

-- Statute requires the Department to investigate complaints according to Commission rules; the Department may then take action to prevent or alleviate damage.

-- Since Nevada has not had a significant game damage problem, complaints are treated on a case-by-case basis.

## NEW MEXICO

-- A statute allows the Department to grant permits to landowners for the capture or destruction of any protected game doing damage to cultivated crops or property.

-- The director must designate the number of animals to be captured or destroyed and must set the time limit for such activity. The problem animals are mainly bear and lion.

-- The 1985 Legislature ordered the Commission to study wildlife damage compensation following failure of legislation patterned after the Colorado law.

## OREGON

-- Statutory wildlife policy says that populations must be regulated "in a manner that is compatible with primary uses of the lands and waters of the state and provides optimum public recreational benefits".

-- Landowner may not take any wildlife without a permit, except that black bear, cougar, bobcat, and red fox doing damage may be taken at any time without permit.

-- The Department has adopted procedures for controlling big game damage which include hazing, repellents, barriers, forage planting, winter feeding, trapping, kill permits, and hunting season strategies.

-- 1985 legislation on compensation and increased ability to take animals without a permit failed but led to a formal legislative request for a new damage policy that is more responsive to damage on private property.

-- Costs for damage prevention have ranged between $800,000 and $1,000,000 for years 1981 to 1985.

## UTAH

-- Statute requires landowner to notify the Department of big game damage to cultivated crops and requires the Department to remove the offending game animals. If the removal is not accomplished within a reasonable time, the landowner may kill the animals and notify the Department of the action and turn in any carcasses.

-- Another statute, enacted in 1948, sets forth the requirements for compensation for crop losses due to big game damage: a crop owner must notify the Department within 48 hours of the damage activity; the Department must appraise the damage as soon as possible and agree with the landowner on a fair payment; a third party appraiser may be used to establish agreement; and the maximum payment per crop owner per year is $2,000.

-- From 1980 to 1983 total claims averaged $30,000. In 1984, claims rose to $143,859 and required an emergency appropriation. The total state cost for damage prevention in 1983-1984 was $616,376. The program is generally funded from license fees.

## WASHINGTON

-- A statute enacted in 1940 authorizes the Department to pay claims for deer and elk damage, not to exceed $1,000 per claim; larger claims are submitted to the legislature. If a claim is

approved, it is paid from revenue derived from license sales.

-- It is Commission policy to not pay damages if the land was posted against hunting during the prior hunting season. Damage assessments are made by wildlife control agents, but county extension agents and neighbors may be asked to assist in the appraisal.

-- The Department's philosophy is to solve problems by working with landowners on prevention and to avoid monetary settlements.

-- The state spends $1,000,000 annually on its control program, mostly for 28 wildlife control agents. The average cost in 1980-1984 for claims was $10,000. Several larger claims are pending before the legislature, which does not act on claims each year.

## WYOMING

-- A statute enacted in 1937 allows a landowner to present to the Department a verified claim within 15 days of damage by big game and game birds. The law recognizes damage to crops, stored crops, fences, and extraordinary damage to native grasslands.

-- The landowner may appeal a department decision to the Commission. If a claimant is dissatisfied with a Commission decision, the claimant may request arbitration by a disinterested arbitrator who is an elector residing in the county where the

damage occurred. To be considered for compensation, the land must be open to hunting.

-- Funding comes from nonresident big game license applications and resident hunting fees. The average payments in 1980 to 1984 were $129,553; in 1984 the cost was $215,474.

-- Landowners also receive compensation for the use of private land by antelope and deer. Each antelope and deer license has a "landowner coupon" that must be delivered, following a kill, to the landowner, who is allowed to redeem each coupon for $8.00.

## SUMMARY

Alberta has a wildlife damage claim fund, but British Columbia specifically denies responsibility for compensation.

Five states (Colorado, Nebraska, Utah, Washington, and Wyoming) provide compensation for wildlife damage, within certain guidelines.

All states but Alaska require the Department to investigate damage complaints.

## Reference Notes


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2. Chapter 72, Laws of 1933; statutes codified as 3729.1 and 3729.2, R.C.M.; recodified as 26-601 and 26-602, R.C.M.

3. Chapter 152, Laws of 1943.

4. Chapters 145 and 146, Laws of 1945.

5. Chapter 136, Laws of 1947; codified as 26-605, R.C.M.

6. Chapter 20, Laws of 1953.

7. Chapter 60, Laws of 1957.

8. Montana Legislative Council, Report and Recommendations, Joint Subcommittee on Fish and Game Report to the 48th Legislature, Helena, Montana, November 1982.

9. Montana House of Representatives, House Fish and Game Committee, Minutes, January 24 and 29, 1985.

10. Montana Department of Fish, Wildlife, and Parks, written testimony submitted to Joint Interim Subcommittee on Agricultural Problems, August 30, 1985.

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12. Mike Aderhold, "Game Damage', Montana Outdoors, November/ December 1985.

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14. Western Association of Fish and Wildlife Agencies, Report of the Ad Hoc Committee on Game Damage and Supplemental Winter Feeding, February 10, 1986.

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Oregon House of Representatives, Preliminary Report to House Committee on Agriculture, Forestry, and Natural Resources, Salem, Oregon, April 1985.

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15. National Conference of State Legislatures, "Potential Private Reserve and Public Benefits from Alternative Agriculture", No. 4, Vol. 11, April 1986.

## SUBCOMMITTEE DELIBERATIONS

The following chronology is designed to highlight the steps of the study process, acknowledge major testimony, list the reports presented to the Subcommittee, and document Subcommittee action on the study issues. All reports, written testimony, and minutes are on file at the Montana Legislative Council.

### First Meeting -- August 30, 1985 -- Helena, Montana

1. Staff presented a study plan and work design for HJR 36. The chairman appointed four members of the Subcommittee to review and refine the study plan. Representative Asay was appointed chairman of the group.

2. Representative Ray Brandewie (R-Bigfork), explained the game damage problems that landowners and tree farmers in northwestern Montana experience and the actions taken by the Department and landowners.

3. Esther Ruud, Montana Cattlemen's Association, read a statement by that group that stressed the need for landowners to be compensated for providing wildlife habitat and hunting opportunities.

4. Jim Flynn, Director, Department of Fish, Wildlife, and Parks, presented a report on the current game damage control activities of the Department. He also explained the Department's "block hunting" services in which hunters are informed of hunting opportunities in an area and the Department assists the group of landowners with signs,

parking areas, permits, and public information. There is an increased demand on the Department to help landowners "structure" the recreational opportunities on their land. Some landowners do charge a "trespass fee", and that does not prevent the Department from helping them in some way. The Department does not collect fees or alter the game management plans for the area in order to encourage this type of enterprise.

5. Keith Kelly, Director, Department of Agriculture, reviewed the results of a 1982 survey on the attitudes of ranchers and farmers toward wildlife and wildlife damage. (See Reference No. 13, page 27)

Second Meeting -- February 21, 1986 -- Great Falls, Montana

1. The Subcommittee approved the study plan for HJR 36, with addition of the issue of cooperative agreements between the Department and landowners regarding sportsmen's privileges and fee hunting.

2. Staff presented a background report on wildlife damage laws and activities in Montana. See pages 1 to 15 of this report.

3. Several Blackfoot Valley ranchers presented the Subcommittee with lists of the types of damage that they and other area landowners have incurred on their property in recent years and offered suggestions on how to mitigate such damage. One rancher had suffered extreme damage because a

neighbor attracted and protected a large herd of elk that often wander onto the rancher's land.

4. Mons Teigan, Montana Stockgrowers' Association, informed the Subcommittee of his group's landowner-recreationist study committee. He stressed that recreation and tourism are important industries in Montana and the private landowner does a great deal to preserve the resources that contribute to that part of the economy.

5. Senator Larry Tveit, (R-Fairview), and Representative Ed Grady, (R-Helena), spoke of the increased burden on landowners to provide recreational opportunities and the need to somehow compensate for the effort, especially in this time of a failing agricultural economy.

Third Meeting -- May 9, 1986 -- Kalispell, Montana

1. Staff presented a survey of the wildlife damage laws and policies of western states and Canadian provinces. See pages 17 to 25 of this report.

   Staff also provided a recent NCSL report on "Potential Private Revenue and Public Benefits from Alternative Agriculture" (See Reference No. 15, page 28.) The study discussed recreation and access fees on private land in other states and liability issues associated with recreational access.

2. The Subcommittee discussed the costs involved in the direct damage compensation programs of other states. In Wyoming and Colorado, yearly costs are over $1,000,000. In 1985, Montana (the

Department) spent over $200,000 in capital outlay for damage prevention.

3. Henry Oldenburg, Flathead County Commissioner, informed the Subcommittee of the consensus reached by an area Fish and Game Advisory Committee. The group supported: expanded sportmen's education rather than creation of more hunting laws and regulations; and increased penalties for poaching violations.

4. Several area landowners expressed views on the unique wildlife damage problems of northwestern Montana. Densely populated hunting areas create safety problems and discourage hunting and access, even though game is plentiful. Game is attracted to tree farms and even the availability of other forage does not reduce the loss of many young trees. Some landowners would like either compensation or more assistance in erecting game barriers.

5. Bruce Maclay, Chairman of the Landowner/ Recreationist Committee of the Montana Stockgrower's Association, explained particular damage problems, such as the bow-hunting-only season, which did not reduce the whitetail deer population and increased consumption of livestock forage. He suggested that area landowners should be more involved in the formulation of local game management plans. He also discussed the need to provide winter feed near winter ranges, even though the Department has opposed that concept.

6. Jim Flynn, Director of Fish, Wildlife, and Parks, explained the steps involved in formulating game management and hunting policies, highlighting the attempts at public input in the process.

7. Lorraine Gillies and Gene Chapel, Montana Farm Bureau, expressed the Bureau's philosophy that a landowner should be able to manage his land for the best economic return and that the option of fee access would be exercised in the future. The Bureau felt any compensation plan should be funded strictly by land users.

8. Representative Rapp-Svrcek offered several letters from his constituents on game damage in northwestern Montana, including an article from an expert on the increase in spotted knapweed and its relationship to loss of animal forage.

9. The Subcommittee spent the afternoon portion of the meeting on a tour of Christmas tree farms, nurseries, and other agricultural operations in the area. The tour included inspection of a number of prevention devices such as electric fences and net coverings for young trees. The tour was conducted by Shawn Riley, Department of Fish, Wildlife, and Parks.

Eighth Meeting -- September 19, 1986 -- Billings, Montana

(Several meetings were held during the special sessions that did not address the wildlife damage study.)

1. Staff presented a report by Gregory J. Petesch, Legislative Council legal director, on the legal consideration of fee hunting on private lands. See Appendix C.

   The report concluded that there are no clear legal impediments to engaging in fee access hunting, either in cooperation with the state or individually; however, a number of recent Montana Supreme Court cases seem to have increased the liability risks of all landowners who allow access, by requiring the same duty of care for all entrants to the land, even trespassers.

2. Staff also presented a report on the Wyoming landowner coupon reimbursement program for deer and antelope hunting on private property. In this program, landowners are compensated in some way for maintaining a wildlife habitat; for every deer or antelope shot on a landowner's property, the landowner is reimbursed $8.00. After the Wyoming Game and Fish Department receives the landowner's coupons, the payment process is computerized to the extent that little time is required to enter the information and prepare the state payment warrants. In recent years, the Department has reimbursed landowners between $600,000 and $700,000 per year. The funding for the program comes from general hunting and fishing license sales.

3. Bill Myers and Bassett Hoiness, Montana Outdoors Recreation, Inc., encouraged the Subcommittee to consider support for programs in other states that allow landowners access to hunting licenses for

distribution to those who wish to hunt on their land. They explained the "ranching for wildlife" programs in California and Colorado, in which the landowner can market a number of licenses and can manage the wildlife on the property to his advantage.

4. Myles Watts, Director, Department of Agriculture/ Economics, Montana State University, told of two research projects at MSU on the economics of fee hunting.

Ninth Meeting -- December 5, 1986 -- Helena, Montana

1. Staff provided information on the California and Colorado programs on "ranching for wildlife", as requested by the Subcommittee at the previous meeting. The intent of the programs is to encourage landowners to realize the economic incentives of providing hunting access for reasonable fees to complement the primary land use practices. To participate in the program, a landowner must: make a three-year commitment; purchase a three-year license costing $300; and provide biological data to the state's fish and game department at his own cost. The department must approve the landowner's game management plan. Once the plan is approved, the landowner may sell game tags and permits directly to residents and nonresidents and may be allowed to offer hunting and fishing opportunities outside normal seasons and bag limits. In Colorado, a minimum land size is required and landowners are not eligible for wildlife damage payments.

2. Staff reported on the legislation developed by a steering committee representing various landowners and sportsmen's organizations in the state. The group sponsored a widely attended conference in April 1986 at Fairmont Hot Springs Resort to build consensus on issues of common concern, such as access to private lands, state hunting and fishing policies, wildlife damage, and landowner compensation for wildlife habitat contributions. The landowner/sportsmen steering committee is working toward consensus on a "wildlife habitat incentive program" that addresses many of the above concerns. The legislation would earmark funds (from increases in resident and nonresident license fees) for the purchase, lease, or conservation easement of lands to preserve and enhance wildlife populations and hunter opportunity.

3. The Subcommittee also reviewed other issues and options, such as direct compensation for game damage, the Wyoming landowner coupon reimbursement program, fee access hunting, legal aspects of landowner liability, low interest loans to landowners for damage prevention, and continued funding for Department damage control efforts.

4. A number of interested persons stressed the need to include landowners in state wildlife management plans and to recognize their contributions in some manner. Suggestions included property tax relief for prime habitat acreage, allowing landowners with habitual damage a number of licenses to sell or give away, and reducing landowner liability exposure.

5. The Subcommittee recommended that the final report reflect their interest and concern with the following issues presented in the study:

   a. That the 50th Legislature recognizes the considerable contributions of landowners to wildlife habitats and recreational opportunities in Montana and encourages the passage of legislation that allows agricultural landowners to expand the economic possibilities of their land, such as recreational fee-access, "ranching for wildlife", or a wildlife habitat incentive program for funding the lease, purchase, or conservation easement of big game and game bird habitat.

   b. That the 50th Legislature enact legislation that would encourage hunting access by limiting a landowner's liability exposure for injury to person and property regardless of the status of the person entering the property and whether a fee is charged; and

   c. That the 50th Legislature continue, and expand if possible, the funding levels granted to the Department of Fish, Wildlife, and Parks for wildlife damage prevention and control.

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# APPENDICES

**87-1-225. Regulation of wild animals damaging property.** Upon the request or complaint of any landholder or person in possession and having charge of any land in the state that wild animals of the state, protected by the fish and game laws and regulations, are doing damage to the property or crops thereon, the department shall investigate and study the situation with respect to damage and depredation. The department may then decide to open a special season on the game or, if the special season method be not feasible, the department may destroy the animals causing the damage. The department may authorize and grant the holders of said property permission to kill or destroy a specified number of the animals causing the damage. No wild ferocious animal damaging property or endangering life shall be covered by this section.

**History:** En. Sec. 1, Ch. 60, L. 1957; amd. Sec. 13, Ch. 417, L. 1977; R.C.M. 1947, 26-135.

**87-1-226. Disposition of meat of animals damaging property.** (1) The meat of all animals killed or destroyed pursuant to 87-1-225 by the department or the authorized landholder shall be conserved and given to state institutions, school lunch programs, the department of social and rehabilitation services, or charitable institutions. The department shall provide transportation and distribution of the meat.

(2) Any meat not accepted by state institutions, school lunch programs, the department of social and rehabilitation services, or charitable institutions shall be sold as provided in 87-1-511.

**History:** En. Sec. 2, Ch. 60, L. 1957; amd. Sec. 22, Ch. 511, L. 1973; R.C.M. 1947, 26-136; amd. Sec. 1, Ch. 120, L. 1985.

**87-1-304. Fixing of seasons and bag and possession limits.** (1) The commission may fix seasons, bag limits, possession limits, and season limits; open or close or shorten or lengthen seasons on any species of game, bird, fish, or fur-bearing animal as defined by 87-2-101; and declare areas open to the hunting of deer, antelope, elk, moose, sheep, and goat by bow and arrow permit holders and designate times when only bows and arrows may be used to hunt deer, antelope, elk, moose, sheep, and goat in those areas. It may declare areas open to deer hunting where shotguns only may be used to hunt or kill deer. In areas where deer hunting is open to the use of shotguns only, the commission may authorize the use of muzzleloaders (rifled or smoothbore). It may declare areas open to special license holders only and issue special licenses in a limited number when it determines, after proper investigation, that such a season is necessary to assure the maintenance of an adequate supply of game birds, fish, or animals or fur-bearing animals. It may declare a special season and issue special licenses when game birds or animals or fur-bearing animals are causing damage to private property or when written complaint of such damage has been filed with the commission by the owner of that property. In determining to whom those licenses shall be issued, it may, when more applications are received than the number of animals to be killed, award permits to those chosen under a drawing system. The procedures used for awarding the permits from the drawing system shall be determined by the commission.

(2) The commission may adopt rules governing the use of livestock and vehicles by archers during special archery seasons.

(3) It may divide the state into fish and game districts and create fish, game, or fur-bearing animal districts throughout the state. It may declare closed season for hunting, fishing, or trapping in any of those districts and later may open those districts to hunting, fishing, or trapping.

(4) It may declare a closed season on any species of game, fish, game birds, or fur-bearing animals threatened with undue depletion from any cause. It may close any area or district of any stream, public lake, or public water or portions thereof to hunting, trapping, or fishing for limited periods of time, when necessary to protect a recently stocked area, district, water, spawning waters, spawn-taking waters, or spawn-taking stations or to prevent the undue depletion of fish, game and fur-bearing animals, and game and nongame birds. It later may open the area or district upon consent of a majority of the property owners affected.

(5) The commission may authorize the director to open or close any special season upon 12 hours' notice to the public.

(6) It may declare certain fishing waters closed to fishing except by persons under 13 years of age. The purpose of this subsection is to provide suitable fishing waters for the exclusive use and enjoyment of juveniles under 13 years of age, at times and in areas the commission in its discretion considers advisable and consistent with its policies relating to fishing.

**History:** En. 26-104.3 by Sec. 4, Ch. 511, L. 1973; R.C.M. 1947, 26-104.3; amd. Sec. 1, Ch. 220, L. 1979; amd. Sec. 1, Ch. 313, L. 1983; amd. Sec. 1, Ch. 487, L. 1985.

APPENDIX B

# GUIDELINES FOR DEPARTMENT OF FISH, WILDLIFE & PARKS BIG GAME DAMAGE PROCEDURES

September 30, 1985

By law, the department is required to respond to all big game damage complaints. Big game damage is a department-wide responsibility, and personnel from all divisions will share a responsibility in responding to complaints. Regional supervisors will be responsible to coordinate efforts within regions. Regional biologists and game wardens will familiarize themselves with areas and circumstances where depredation might occur. General hunting seasons will remain a primary tool to deal with population numbers to address potential game damage problems.

The following procedures will be used to address and prevent game damage problems:

1. The DFWP will respond to a damage complaint as soon as possible, and within 48 hours. If the department person who received the complaint is unable to respond within 48 hours, he will immediately refer the complaint to the nearest department employee who can respond within a 48-hour period. Exceptions can be made if complainant is agreeable to a longer waiting period.

   A. The DFWP will respond to all damage complaints under this policy with the exception of 1B. A phone call or on-site visit constitutes an immediate response under this provision.

   B. Damage caused by nongame, furbearing, or federally listed threatened and endangered species are not covered by this policy, but will continue to be addressed on a case-by-case basis.

2. The DFWP shall make a written record of each complaint. This form must include action(s) taken or recommended. A copy of the investigator's report will be left with the landowner if so desired. This report will be submitted on all complaints, including those which required no immediate action. Such reports will be submitted to the administrator of the Field Services Division, regional supervisors, regional game managers and warden captains. A central game damage file will be maintained at the Field Services Division office in Helena. Each region will maintain a complete game damage file and it is the responsibility of the regional supervisor to keep it updated.

Report forms for recording game damage complaints will be prepared and distributed by the Field Services Division administrator.

3. Several courses of action can be initiated by the regional supervisor in response to legitimate damage complaints. A summary of potential options follows:

   A. Special seasons. These will be used under the following conditions:

      (1) A time frame of mid-August through February.

      (2) Reasonable hunter access is available to allow for harvest of problem animals.

      (3) There are enough animals involved to justify public hunting.

      (4) It is a recurring problem, and animals are normally unavailable during the general season.

      (5) Special seasons to reduce numbers are a priority option if the land is posted against hunting, fee hunting is taking place, or the hunting rights are leased.

   B. Herding: As a temporary measure, herding may be employed where effective.

   C. Dispersal: A variety of animal dispersal methods may be employed, such as airplanes, snowmobiles, cracker shells, scareguns, and other scare tactic devices.

   D. Repellents: Bloodmeal and other repellents can be employed as temporary solutions under appropriate conditions.

   E. Fencing: If the problem is chronic and involves haystacks, various fencing options can be utilized:

      1. Permanent stackyards. In cases where records show haystack damage occurs annually, permanent stackyards are the best solution. The department will furnish the property owner with posts and wire. It will be the landowner's responsibility to construct the fence and to provide proper maintenance.

         In situations where stackyards enclose several acres, particularly those surrounding round bales, permanent stackyards may not be the most desirable treatment of the problem. (See 2.)

2. Electric fencing. In situations where a large area is being used for a stackyard, such as round bale storage, electric fencing may be the most feasible solution. The department will provide the charger and fencing materials. On the initial installation, the department will assist in setting up the fence. The storage and care of this equipment is the responsibility of the rancher, and with proper care, materials should last three years. If game damage does not recur in succeeding winters, the department will pick up the charger for use in other areas.

3. Snowfence. If a haystack has straight sides, 4 or 6 ft snowfence works well, or in the case of elk, 8 ft panels may be used. It is reasonable to assume the snowfence or panels will last for a minimum of three winters if properly cared for. Rolling and storage are the rancher's responsibility. Depending upon the size of the area and availability, the department will furnish the snowfence or panels, and the property owner will be responsible to put it up, take it down, and provide maintenance.

4. It will be the responsibility of the landowner to store materials furnished by the department in a manner consistent with proper care with reasonable wear expected. A signed agreement with the landowner will record any planned actions and serve as a receipt for any provided materials. These agreements will be sent to the individuals outlined in Item 2. Fence fabric shall be returned to the department when it is no longer needed for wildlife depredation protection. Materials will be replenished when reasonable wear makes them ineffective.

F. Kill Permits: In certain situations, a kill permit may be considered to be the best immediate solution and may be activated without first exhausting any of the previously mentioned methods. Authorization for kill permits may be expedited by a phone call to Helena (Director's Office, Enforcement or Field Services).

G. In specialized situations, netting or mechanical devices may be used to reduce tree damage.

4. Bulletins - The Field Services Division Administrator will be responsible to develop:

A. A bulletin for landowners informing them of preventive methods they can initiate to reduce game damage problems as well as assistance they can receive from this department (by Fall 1986).

B. A manual of techniques for department personnel, including an updated literature review for new game damage methods for preventing, minimizing, or solving game damage problems (by Fall 1986). Updates will be provided following annual review of new techniques.

5. The department has the responsibility to address all game damage complaints; however, assistance may be discontinued to a landowner who continues to aggravate game damage problems by closing or leasing his property to hunting in succeeding years or when reasonable suggestions, actions or remedies offered by the department have been refused. The decision to terminate assistance will be made by the director's office after reviewing the circumstances.

6. Evaluation - Administrators, supervisors, regional game managers, and warden captains will annually review and evaluate game damage methods to see if such methods and materials being utilized are properly addressing depredation problems. This evaluation will include an annual review of hunting regulations, quotas, etc., to ascertain their effectiveness in properly attempting to prevent game damage problems.

APPROVED:

James W. Flynn
Director

APPENDIX C

# LEGAL CONSIDERATIONS OF BLOCK HUNTING ON PRIVATE PROPERTY FOR A FEE

Prepared for Joint Interim Subcommittee on Agricultural Problems

By Gregory J. Petesch
Director of Legal Services
Montana Legislative Council

September 1986

Research has been requested on the possible legal concerns arising out of a state-administered block hunting program, in which a group of private landowners would authorize hunting on their property in exchange for a fee. There seem to be three major areas of concern: 1) General Propriety; 2) Liability; and 3) Professional Licensing. I will address each of these areas of concern in turn.

## General Propriety

The ownership of wild animals is in the state, held in its sovereign capacity for the use and benefit of its people. Rosenfeld v. Jakways, 67 M 558, 216 P.2d (1923). Montana recognizes both sovereign ownership and the police power as ample bases for wildlife regulation. St. v. Jack, 167 M 456, 539 P.2d 726 (1975). The exclusive right of hunting or fishing on land owned by a private individual is in the owner of the land, or in those who do so by permission as his guests or by his grant. Herrin v. Sutherland, 74 M 587, 241 P 328 (1925). In Montana Coalition for Stream Access, Inc., v. Curran, ___ M ___, 684 P.2d 1088

(1984), the Montana Supreme Court distinguished this holding, saying:

> This holding is irrelevant for at least three reasons: (1) Fall Creek is a nonnavigable stream, at least according to Curran, and therefore has no application to this case; (2) the holding is purely dicta, has no precedential value and may be disregarded; and (3) the holding is contrary to the public trust doctrine and the 1972 Montana Constitution.

Curran, however, dealt solely with the recreational use of and access to public water, which pursuant to Article IX, Section 3 of the 1972 Montana Constitution includes all surface water. The holding of Herrin relating to hunting on private land should not be affected by Curran, because in Montana Coalition for Stream Access, Inc. v. Hildreth, ___ M ___, 684 P.2d 1088 (1984), the court held that the public has no right to trespass over private property in order to reach the state-owned waters. Because there is no similar constitutional provision relating to land as the provision claiming ownership of surface waters in the state for the use of the people, landowners have the ability to regulate who enters upon their land for recreational purposes. The Legislature has determined, however, that hunting is a permissible recreational use of surface water. 23-2-301(10), MCA. This does not include big game hunting except with a long bow or shotgun on Class I waters or any big game hunting on Class II waters. 23-2-302, MCA. Hunting access with respect to surface water will be disregarded for the remaining purposes of this paper. The state has recognized the right to create private shooting preserves with respect to game birds, Title 87, Chapter

4, part 5, MCA, so there seems to be no impediment to establishing block hunting areas in which a fee is charged for access.

## Liability

There are two potential areas of liability involved in a state-administered block hunting program--the liability of the state and the liability of the landowners. Potential liability of the state would be determined by how the block hunting plan was implemented. The duties and responsibilities of the state under the scheme would determine potential liability. Landowners' potential liability would be determined according to the traditional rules setting forth a property owner's duty of care. Historically, there have been three classes of people using private land--trespassers, licensees, and invitees. The landowner had a separate standard of care towards each class. The duty imposed upon a property owner in Montana is dependent on the status of the injured party, either invitee, licensee, or trespasser. Rennick v. Hoover, 186 M 167, 606 P.2d 1079 (1980).

The duty owed to a trespasser is not to injure him intentionally or wantonly. This standard would hold a landowner liable for acts of omission or commission disclosing a reckless disregard for the safety of others. McLaughlin v. Bardsen, 50 M 177, P. 954 (1915). A criminal trespasser in Montana is one who enters land which is posted or after the landowner has denied permission. See 45-6-201, MCA. Section 87-3-304, MCA, requires that a hunter obtain the landowner's permission before hunting big game animals on private property.

A licensee is a person who enters property by permission only, with no economic inducement by either party. The duty to a licensee is generally stated as the duty to refrain from acts of willful and wanton negligence. Maxwell v. Maxwell, 140 M 59, 367 P.2d 308 (1961). A landowner who merely gives permission to hunt without charging a fee would normally owe hunters the duty of a licensee. Montana and most other states have enacted statutes limiting landowner liability in connection with allowing hunting on private property. Montana's statute is 70-16-302, MCA, which provides:

> 70-16-302. Restriction on liability to permittee. A landowner or tenant who permits, by act or implication, any person to enter upon any property in the possession or under the control of such landowner or tenant for any recreational purpose without accepting a valuable consideration therefor does not by granting such permission extend any assurance that such property is safe for any purpose or confer upon such a person the status of invitee or licensee to whom any duty of care is owed, and such landowner or tenant shall not be liable to such person for any injury to person or property resulting from any act or omission of such landowner or tenant unless such act or omission constitutes willful or wanton misconduct.

The federal district court has stated:

> The only purpose of the recreational use statute is to encourage landowners to make their lands freely available to the public by limiting landowners' tort liability. Fisher v. U.S., 534 F.Supp. 514, 39 St.Rep. 518 (D.C. Mont. 1982).

The statute has also been held to apply to both real and personal property. St. ex rel. Tucker v. District Court, 155 M 202, 468 P.2d 773 (1970).

The Idaho Supreme Court has held that a similar statute does not violate due process, Corey v. State, 703 P.2d 685 (1985), and does not deny equal protection of the law, Johnson v. Sunshine Mining Co. Inc., 684 P.2d 268 (Id. 1984).

The situation involved in fee hunting would confer upon the hunter the status of an invitee. An invitee is one who is invited onto the owner's property in connection with business, or in which there is a mutual benefit for the parties. The Montana Supreme Court has held under the general rule that the duty owed the business invitee is to exercise ordinary care to have the premises reasonably safe or to warn the invitee of any hidden or lurking dangers; the invitor is not, however, an insurer against all accidents and injuries to invitees. Scott v. Robson, 182 M 528, 597 P.2d 1150 (1979), citing Dunham v. Southside National Bank of Missoula, 169 466, 548 P.2d 1383 (1976); Hackley v. Waldorf Hoerner Paper Co., 149 M 286, 425 P.2d 712 (1967); and Cassaday v. City of Billings, 135 M 390, 240 P.2d 509 (1959).

Recently the Montana Supreme Court has relied upon 27-1-701, MCA, to remove the distinctions between the classes of people using private land and the duty owed them. Section 27-1-701, MCA, provides:

> 27-1-701. Liability for negligence as well as willful acts. Everyone is responsible not only for the results of his willful acts but also for an injury occasioned to another by

> his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

In Corrigan v. Junney, ___ M ___, 626 P.2d 838, 38 St.Rep. 545 (1981), the Montana Supreme Court held that 27-1-701, MCA, prevented them from distinguishing between social guests (licensees) and invitees in determining the liability of the landowner for injuries received. In Limberhand v. Big Ditch Co., ___ M ___, ___ P.2d ___, 42 St.Rep. 1460 (1985), the court found that the same statute declared the applicable law as to the duty of landowners to persons even though they were trespassers. The court said:

> ... the test is not always the status of the injured party but the exercise of ordinary care in the circumstances by the landowner. Limberhand at 1465.

Limberhand also stated that if a dangerous instrumentality is located on land adjoining a landowner's property and the instrumentality poses a clear and forseeable danger to persons properly using the landowner's property, the landowner is not immune from liability as a matter of law. The court found that a duty to take some reasonable precautions may exist. This duty depends upon the circumstances involved and may range from a duty to warn to a duty to take remedial action. See Limberhand at 1470.

It appears from the language in the Limberhand decision that each incident involving potential liability of a landowner will be decided upon its individual facts. The court or a jury will have to determine whether the

landower exercised ordinary care in the circumstances of the individual case.

## Professional Licensing

Title 87, Chapter 4, part 1, MCA, regulates the occupations of outfitters and professional guides. Section 87-4-101(3) defines outfitter as follows:

> (3) "Outfitter" means any person, except a person providing services on real property that he owns for the primary pursuit of bona fide agricultural interests, who:
> (a) engages in the business of outfitting for hunting or fishing parties, as the term is commonly understood;
> (b) for consideration provides any saddle or pack animal or personal service for hunting or fishing parties or camping equipment, vehicles, or other conveyance, except boats, for any person to hunt, trap, capture, take, or kill any game and accompanies such a party or person on an expedition for any of these purposes;
> (c) for consideration furnishes a boat or other floating craft and accompanies any person for the purpose of catching fish; or
> (d) for consideration aids or assists any person in locating or pursing any game animal. (Emphasis supplied.)

Section 87-4-121, MCA, requires an "outfitter", as defined in 87-4-101(3), to be licensed and to meet the qualifications contained in 87-4-122, MCA.

In a block hunting situation, the exemption from the definition of outfitter for providing services on property owned by the individual would not technically apply because common ownership would not be in "a person". Under 87-4-101(3)(d), the group of landowners could be construed to be engaged in outfitting by

charging a person for assisting the hunter in locating game animals. This section should be closely considered in determining whether the Legislature wishes to establish a state-administered block hunting program.

## Conclusions

There seem to be no legal impediments to establishing a state-administered block hunting program. There are legal concerns that will need to be considered in establishing such a scheme. The methodology used for administering the program will determine the types of legal concerns involved. Existing statutes will have to be examined to prevent conflicts or unintended results based upon the policy decisions made in establishing a state-administered program.

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